NATIONAL ORGANIZATION FOR WOMEN

Comments of the National Organization for Women on the Department of Education's Notice of Intent to Regulate on Single-Sex Education

67 Fed. Reg. 31,098

I. Introduction

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal.

Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (emphasis added). Since 1954, this principle has been part of the fabric of United States constitutional law, and indeed, our society. Notwithstanding this deeply embedded principle, the United States Department of Education's Office of Civil Rights ("OCR") has recently proposed to take steps that will reintroduce segregation into the public education system—this time in the form of segregation by sex, instead of race.

On May 8, 2002, OCR issued a Notice of Intent to Regulate ("Notice") stating that it "intends to propose amendments to the regulations implementing Title IX of the Education Amendments of 1972 [("Title IX")] to provide more flexibility for educators to establish single-sex classes and schools at the elementary and secondary levels." 67 Fed. Reg. 31,098 (May 8, 2002). The purported intent of these anticipated amendments is "to support efforts of school districts to improve educational outcomes for children and to provide public school parents with a diverse array of educational options that respond to the educational needs of their children, while at the same time ensuring appropriate safeguards against discrimination." Id. The Notice makes reference to recent amendments to the Elementary and Secondary Education Act ("ESEA") allowing local educational agencies to use certain funds for innovative assistance programs, which may include, among other things "[p]rograms to provide same-gender schools and classrooms (consistent with applicable law)." 20 U.S.C.A. § 7215(a)(23) (2002).

The National Organization for Women ("NOW") strongly opposes OCR's proposal. The legal and policy reasons OCR should abandon this proposal are summarized in the Executive Summary provided in Section II below. Sections III through VII of these comments describe NOW's concerns in more detail.

II. Executive Summary

OCR's tentative proposal to amend the regulations implementing Title IX to facilitate the establishment of single-sex programs in primary and secondary schools is flawed on both legal and policy grounds. Reasons for abandoning the proposal include the following:

• **Raises Constitutional Concerns.** In the landmark decision of Brown v. Board of Education, the Supreme Court recognized that "separate educational facilities are inherently unequal." 347 U.S. 483, 495 (1954). OCR's proposal to introduce sex segregation into the public schools contradicts the bedrock principles articulated in Brown. Moreover, OCR's proposal violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Given the lack of evidence supporting a relationship between sex segregation and improved educational outcomes, OCR cannot demonstrate the "exceedingly persuasive justification" that is needed to overcome the heightened scrutiny courts must apply to measures that discriminate on the basis of sex in public education. United States v. Virginia, 518 U.S. 515, 531 (1996).

- **Lacks Supporting Research.** Current research fails to support OCR's threshold position that separating boys and girls produces educational benefits. Older research that suggested a correlation between same-sex programs and educational outcomes failed to control for other factors—such as socioeconomic status of the students, selectivity of admissions, resources invested in the program, and class size—that are more likely to affect performance. As recent studies demonstrate, once those confounding variables are taken into account, differences between same-sex and coeducational schools disappear.
- **Conflicts With Existing Law.** Although recent legislation authorized funds to explore same-sex alternatives in public schools, Congress expressly provided that such alternatives must be "consistent with applicable law." 20 U.S.C.A. § 7215(a)(23) (2002). OCR's plan to facilitate the separation of boys and girls in public schools contradicts both the letter and spirit of existing statutes designed to promote gender equity—including the Equal Educational Opportunity Act and Title IX of the Education Amendments of 1972.
- **Undermines Diversity.** The Supreme Court has recognized that the government has a compelling interest in promoting diversity in educational settings. See Regents of the University of California v. Bakke, 438 U.S. 265, 314 (1978). Although cloaked in rhetoric about enhancing diversity, OCR's proposal to separate students based on identity characteristics would undermine this compelling interest and deprive students of the benefits associated with a diverse educational environment.
- **Fails to Ensure Equal Opportunity.** OCR's plan is based on the unsubstantiated premise that equal opportunities can be provided to male and female students when they are separated on the basis of sex. Unfortunately, decades of experience in related areas, such as job training, college athletics, and professional sports, indicate that female-dominated programs consistently receive fewer resources than male-dominated programs. Separating girls and boys in primary and secondary educational programs therefore threatens to exacerbate, rather than ameliorate, inequities between boys and girls.
- **Perpetuates Sex-Stereotyping and Feelings of Superiority/Inferiority.** Studies show that all-boys schools promote sexism and feelings of superiority toward women. Girls, as the traditionally subordinated group, are likely to experience a badge of inferiority as a result of being grouped on the basis of sex—particularly if there are all-boys schools—because the message to the girls is that they are the problem.
- **Undermines Workplace Equality.** Depriving boys and girls of the opportunity to interact daily as peers in the classroom during their formative years will adversely affect gender relations in the adult workplace and in their lives. To promote workplace equality and eliminate the glass ceiling, collaborative interaction between girls and boys in primary and secondary schools should be fostered, not eliminated.
- **Fails to Adequately Address Harassment and Discrimination.** While sexual harassment and other forms of discrimination are legitimate concerns for girls in our public schools, separating the sexes is merely a "band-aid" fix that inappropriately treats girls as the problem by removing them from the presence of their male peers. Only a small portion of girls would likely participate in same-sex programs, and those girls who remain in the coeducational environment would be even more likely to suffer from harassment and discrimination as a result of the schools' failure to address those problems head-on. Investing resources in sexual harassment and sex-equity training for students and teachers would be a much more constructive and effective method of providing a long-term solution to this very real problem.

These and other concerns are examined in greater detail below.

III. National Organization for Women

NOW is uniquely qualified to provide input on the issues raised in the Notice. NOW is a non-profit organization dedicated to making legal, political, social, and economic change

in our society in order to eliminate sexism and end discrimination. There are more than 550 NOW chapters located throughout the United States, and the organization has more than one-half million contributing members. Since its founding in 1966, NOW has vigorously advocated equity between women and men in all aspects of society, including public education. As a civil rights organization with a particular focus on women's rights, NOW opposes regulatory programs that threaten to deprive women of equal protection of the laws, such as the program OCR is currently contemplating.

NOW actively supported the enactment of Title IX in 1972 and has remained vigilant since that time in pursuing the protections promised by Title IX. NOW is staunchly opposed to any legislative or regulatory measures that would undermine those protections. By facilitating sex segregation in public schools, OCR's proposed measure would contravene the statute's overriding objective of fostering equality. For the legal and policy reasons set forth below, NOW urges OCR to abandon its efforts to separate girls from boys in public elementary and secondary education.

IV. The Measures OCR Is Contemplating Raise Serious Constitutional Concerns.

In the Notice, OCR erroneously claims that, in light of a purported exemption from Title IX, "a school district does not need to provide the Department with a justification for offering a single-sex school." 67 Fed. Reg. 31,099. In addition to misconstruing Title IX,[1]/ this statement fails to consider whether single-sex programs can survive scrutiny under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[2]/ At its core, OCR's plan would reinstitute a practice that runs contrary to U.S. constitutional ideals—the practice of segregation in public schools. Although OCR's proposal concerns segregation on the basis of gender instead of race, it must be evaluated against the backdrop of Brown v. Board of Education, 347 U.S. 483 (1954), which signaled the end of our country's shameful history of racial segregation.

While OCR's proposal is directed at gender instead of race, the rationale on which Justice Warren relied in Brown applies equally in this context.[3]/ In Brown, the Supreme Court recognized the critical role of public education in a democratic society. The Court described public schools as the primary instruments that introduce children to cultural values, prepare them for future employment, and assist them in adjusting to their environment, and went on to state that children who are denied equal educational opportunities cannot "reasonably be expected to succeed." Brown, 347 U.S. at 493. Emphasizing the pernicious effects of segregation, the Court noted that "[t]o separate [grade school children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Id. at 494. These same principles apply to any plan for single-sex education in the public schools. Whether mandated or made available on a "voluntary" basis, publicly sponsored segregation threatens to impose a badge of inferiority on historically disadvantaged groups. See Nancy Levit, Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation, 67 Geo. Wash. L. Rev. 451, 517 (1999) ("Levit").

A. The Establishment of Single-Sex Public Education Would Not Likely Survive an Equal Protection Challenge.

A constitutional analysis of OCR's proposal is an essential first step. Any rule providing for the establishment of single-sex public schools or classes would expressly discriminate on the basis of sex and, thus, would trigger analysis under the Equal Protection Clause of the Fourteenth Amendment. See Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723 (1982) (holding that denying otherwise qualified males the right to enroll for credit in a

state-sponsored nursing school violated the Equal Protection Clause). The Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall . . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. In evaluating whether gender-based distinctions violate the Equal Protection Clause, courts apply heightened scrutiny. See United States v. Virginia, 518 U.S. 515, 531 (1996) ("VMI") (finding that the state failed to show an exceedingly persuasive justification for excluding women from a publicly funded military college in violation of equal protection (quoting Hogan, 458 U.S. at 724)). [4]/

OCR's proposal very likely would not survive heightened scrutiny. Courts repeatedly have rejected efforts to establish and maintain publicly funded single-sex education programs on equal protection grounds. In VMI, the Supreme Court found that Virginia had not shown an exceedingly persuasive justification for prohibiting women from participating in the citizen-soldier training offered at the Virginia Military Institute. See VMI, 518 U.S. at 534. Similarly, in Hogan, the Court held that the state interest asserted by Mississippi to explain the need to prohibit men from attending a public nursing school did not establish an exceedingly persuasive justification to maintain the single-sex institution. See Hogan, 458 U.S. at 731. In Garrett v. Board of Education, a federal district court enjoined the implementation of all-male academies in a public school system, finding that the plaintiffs were likely to prevail on the merits of their arguments against sex segregation. 775 F. Supp. 1004, 1009-10 (E.D. Mich. 1991).

This line of precedent makes it extremely difficult, if not impossible, for OCR's plan to survive equal protection scrutiny. In his dissenting opinion in VMI, Justice Scalia professed that, "[u]nder the constitutional principles announced and applied today, single-sex education is unconstitutional." VMI, 518 U.S. at 595. He further stated: "In any event, regardless of whether the Court's rationale leaves some small amount of room for lawyers to argue, it ensures that single-sex public education is functionally dead." Id. at 596.

Nevertheless, OCR is now proposing to establish single-sex schools and/or classes in public primary and secondary schools. As Justice Scalia acknowledged, such an effort cannot survive equal protection scrutiny. No exceedingly persuasive justification exists for establishing same-sex schools and/or classes in the public education system. Presumably, the state interest that OCR is attempting to advance is to "improve educational outcomes for all students," 67 Fed. Reg. 31,098, and NOW does not oppose this objective. OCR's plan does not fulfill the second prong of the equal protection test established by the Court, however, because "the discriminatory means employed [is not] substantially related to the achievement" of the stated objective. Hogan, 458 U.S. at 724 (citations and internal quotations omitted).

Before taking the extreme step of separating girls and boys in the public schools, the government must show that this discriminatory act is closely related to achieving the objective of improving the public schools. Given the lack of sound evidence demonstrating a causal relationship between single-sex schools and improved education, OCR's proposal is unlikely to survive heightened scrutiny. While various researchers have explored the effects of single-sex education, the existing body of research does not support the measures OCR contemplates for several reasons:

- **Recent Studies Do Not Support OCR's Plan.** While studies from the late 1970s and early 1980s have been touted as demonstrating some benefits from same-sex schools, more sophisticated studies in the 1990s dispute these results. See Levit at 500-01. These later studies reveal that, once researchers control for background factors such as intelligence, socioeconomic status, motivation, and prior achievement, there are no statistically significant differences between all-female and coeducational schools. See id. at 491, 504-05. Moreover, the older studies should be viewed with skepticism, because conditions in society concerning gender roles and expectations for women have substantially changed since the

time those studies were conducted. See Patricia B. Campbell and Ellen Wahl, What's Sex Got To Do With It? Simplistic Questions, Complex Answers ("Campbell and Wahl") in American Association of University Women Educational Foundation, Separated by Sex: A Critical Look at Single-Sex Education for Girls (1998) ("AAUW Compilation") 70.

• **Inconclusive Results and Confounding Variables.** There is no consensus in the existing body of research that single-sex schools are beneficial, and older studies that do suggest benefits fail to control for confounding variables. Although single-sex schools arguably benefit *some* students in *some* settings, "researchers do not know for certain whether the benefits derive from factors *unique* to single-sex programs, or whether these factors also exist or can be reproduced in coeducational settings." AAUW Compilation 2. Studies or anecdotes suggesting a correlation between same-sex programs and positive educational outcomes have no meaning unless an effort was made to control for variables such as socioeconomic status of the students, selectivity of admissions, greater resources invested in the program, and smaller class size. Indeed, without controlling for those variables, one could make the case for separating students based on *any* identity characteristic (such as red hair, blue eyes, etc.). Any group of students provided with better resources than are generally available in the public school system—e.g., strongly motivated teachers, parents, and students, better equipment, smaller class size—undoubtedly would outperform its peers.

• **Data Quality Issues.** As noted above, studies claiming benefits of single-sex education fail to control adequately for confounding variables, such as the smaller class sizes and increased resources available in same-sex programs. The recently enacted Data Quality Act ("DQA") and its implementing guidelines suggest that OCR should not rely on these flawed studies in implementing a regulatory proposal. In the DQA (which can be found at section 515(a) of the Treasury and General Government Appropriations Act for Fiscal Year 2001), Congress directed the Office of Management and Budget ("OMB") to issue government-wide guidelines that "provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies . . . ." Pub. L. No. 106-554 app. C, 114 Stat. 2763A, 154 (2001). OMB recently finalized guidelines implementing the DQA, see 67 Fed. Reg. 369 (Jan. 3, 2002), and the Department of Education has announced the availability of draft guidelines conforming with those implemented by OMB, see 67 Fed. Reg. 21,641 (May 1, 2002). The Department's guidelines would apply to research findings the Department "uses . . . as the official position of the Department, or in support of the official position of the Department." Draft Information Quality Guidelines, at http://www.ed.gov/offices/OCIO/info_quality/draft_guide.html. Based on the DQA and its implementing guidelines, OCR should not rely on flawed studies that fail to control for confounding variables to justify its contemplated rulemaking.

• **Overwhelming Similarities Between Sexes.** Although it is undisputed that some differences exist in a comparison of "all boys" and "all girls," much greater differences exist among members of a group of girls or a group of boys than between the two sexes as a whole. See Campbell & Wahl at 66. An individual's sex alone does not provide any information about that person's academic skills, athletic abilities, or personality traits. See id. It might be true that, on average, boys are more aggressive than girls; however, many females are more aggressive than most of their male counterparts. In fact, researchers who have analyzed thousand of studies investigating gender differences have noted that

> gender differences in cognitive and affective areas are relatively small and becoming smaller. For example, the degree of overlap in girls' and boys' math skills has been computed to be between 98 and 99 percent, while in verbal skills the degree of overlap has been found to be 96 percent.

Id. (citations and footnotes omitted). Given the research showing that commonalities between boys and girls far exceed the differences, the drastic step of separating boys and girls in public schools is not warranted.

• **Perception Versus Reality.** Studies have also demonstrated a paradox between perceived benefits of same-sex schools and the benefits these schools actually produce. See Pamela Haag, Single Sex Education in Grades K-12: What Does the Research Tell Us?, in AAUW Compilation 34. Much of the support for same-sex learning stems from the belief that same-sex settings provide a more conducive learning environment for women. However, this conception is not substantiated by research results. In fact, research has consistently shown that "girls' math and science achievement, measured by a variety of means, has not shown statistically significant gains in the single-sex classroom." Id.
• **Rarity Skews Benefits.** At least one researcher has pointed out that the purported success of some single-sex programs is limited to school systems in which single-sex education is rare. See Cornelius Riordan, The Future of Single-Sex Schools, in AAUW Compilation 55. If single-sex schools are made available on a limited or pilot basis, there is a significant risk that their effect may be distorted (particularly if they employ selective admissions and/or offer greater resources than other schools). If same-sex schools became more common, which could occur if OCR implements its proposal, improved educational outcomes would not likely be realized in the larger population. See id.

In short, existing studies do not support the proposition that separating girls from boys in primary and secondary students schools is closely related to performance in the classroom. In the absence of supporting research based on sound methodology, OCR's plan rests on anecdotes and gender stereotypes. The Supreme Court has made clear, however, that it is unacceptable to use gender as a proxy in matters relating to public education. In Hogan, the court explained that

[a]lthough the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.

Id. at 724-25. Because OCR's proposal is based on stereotypes, rather than sound research, it is inconsistent with the Equal Protection Clause.

B. OCR's Proposal Would Undermine the Government's Compelling Interest in Diversity.

OCR's proposal not only lacks an exceedingly persuasive justification for its implementation as mandated by the Equal Protection Clause, it also undercuts the government's compelling interest in creating a diverse educational environment. In the context of higher education, courts have agreed that diversity is a compelling interest. See Regents of the University of California v. Bakke, 438 U.S. 265, 314 (1978) (Powell, J.) (addressing a university admissions program); Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002) (upholding a law school admissions policy that was narrowly tailored to serve the compelling interest of achieving a diverse student body). The Supreme Court has recognized that diversity is important in educational contexts because "the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." Bakke, 438 U.S. at 313 (citations omitted). While the cases cited above specifically concern racial diversity, there is no question that the state's interest in promoting gender diversity is equally compelling. In addressing the composition of juries, the Supreme Court acknowledged the importance of gender diversity. See J.E.B., 511 U.S. at 133-34.

The presence of both sexes is equally, if not more, important in the educational environment. Most researchers agree that coeducational schools are a better environment in which to "prepare students for adult occupational and interpersonal roles." Levit at 495. For

instance, coeducation helps students gain "the understanding of how to maintain long-term relationships with members of the opposite sex and how to avoid falling unthinkingly into traditional or stereotypic roles." Id. Although OCR's proposal is cloaked in rhetoric about enhancing diversity by expanding choice, the concept of separating students based on identity characteristics is the antithesis of diversity. The government's compelling interest in diversity, particularly when measured against the shaky evidence in support of single-sex education, counsels in favor of abandoning OCR's plan.

C. Making Single-Sex Alternatives "Voluntary" Would Not Remedy the Equal Protection Problem.

Given the Brown decision and the equal protection concerns articulated above, there can be no question that making single-sex programs *mandatory* would run afoul of the Constitution. Even if OCR were to implement its plan on a "voluntary" basis such that no student would be forced to participate in a single-sex program, this so-called "voluntariness" would not cure the plan of its constitutional flaws. Students who do not voluntarily submit to single-sex programs inevitably would be affected by the existence of those programs. For example, one likely effect of an all-girls school would be to skew the sex ratio in existing coeducational schools or classes, resulting in adverse impacts for the female students remaining in those programs. Researcher Valerie Lee has identified this problem, explaining:

It is not possible to offer separate-by-gender classes only for girls without seriously influencing the gender balance in the remaining classes. We had indications from our research that when supposedly coeducational settings depart much from a 50-50 balance of girls and boys toward larger proportions of boys, there are some negative consequences for girls.

AAUW Compilation 50. Furthermore, if a school district were to provide students with the option to attend an all-female school, the district might not feel as compelled to address the sex discrimination occurring in its coeducational schools, even though it would still be the district's responsibility to combat these problems. Thus, the plan would likely have a discriminatory impact on students who do not voluntarily submit to sex segregation.

Because students (particularly girls) who do not elect to enter single-sex programs might suffer as a result of the siphoning effect of those programs, making the programs voluntary would not remedy their constitutional deficiencies.

D. A Single-Sex Program Based On a Standard of "Comparability" Would Be Unconstitutional.

In the Notice, OCR asks whether, in light of the VMI decision, a school district that establishes single-sex schools for one sex should "be required to establish schools or classes for the other sex that are *'comparable'* or that meet some other standard." 67 Fed. Reg. 31,099 (emphasis added). Even assuming that the establishment of single-sex schools or classes can survive equal protection scrutiny (which NOW asserts it cannot), providing merely "comparable" alternatives is inadequate. Women must be afforded "genuinely equal protection." VMI, 518 U.S. at 557. As explained in more detail in Section VI.A. below, however, there is simply no support for the proposition that it is possible to provide *truly equal* opportunities in a sex-segregated primary or secondary school.

V. Regulations Facilitating the Establishment of Single-Sex Public Schools Would Be Inconsistent With Existing Legislation.

Beyond raising the constitutional concerns described in Section IV above, OCR's plan

contravenes the spirit and letter of existing laws that promote the objective of gender equity.

A. Title IX

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C.A. § 1681(a). OCR currently is interpreting that provision to exclude primary and secondary school admissions from the scope of its prohibitions, relying on a portion of the statute which provides that "in regards to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education." 20 U.S.C.A. § 1681(a)(1). However, an analysis of past judicial and administrative actions interpreting Title IX, along with the plain language of the regulations implementing Title IX, casts serious doubt on OCR's current interpretation. [5]/

At least one court has concluded that Title IX prohibits sex segregation in primary and secondary schools. In Garrett, the district court enjoined the establishment of all-male public academies that would serve students in preschool through grade eight, finding that the plaintiffs were likely to succeed in proving that the academies violated Title IX. See Garrett, 775 F. Supp. at 1009-10. In holding that Title IX applied to primary and secondary schools, the Garrett court relied on legislative history. The court explained that Title IX only allows the continuation of pre-existing single-sex schools. See Garrett, 775 F. Supp. at 1009. It further noted that Title IX

is not viewed as an authorization to establish new single sex schools. No case has ever upheld the existence of a sex-segregated public school that has the effect of favoring one sex over another. The interplay of the Constitution and other statutes, as well as the legislative history, diminishes the persuasiveness of this argument.

Id.

Prior administrative actions also indicate that Title IX prohibits the establishment of same-sex schools. In prior administrations, written opinions by OCR articulated this view. See id. at 1009 & n.9 (citing OCR opinions); Note, Inner-City Single-Sex Schools: Educational Reform or Invidious Discrimination?, 105 Harv. L. Rev. 1741, 1754 n.95 (1992), citing Letter from Jesse L. High, Regional Civil Rights Dir., United States Dep't of Educ. Office of Civil Rights, to Dr. Joseph H. Fernandez, Superintendent of Schs., Dade County Pub. Schs. 2 (Aug. 31, 1988) (informing Miami School District that establishing all-black, all-male classes would violate Title IX) (on file at the Harvard Law School Library)); Erin A. McGrath, Note, The Young Women's Leadership School: A Viable Alternative to Traditional Coeducational Schools, 4 Cardozo Women's L.J. 455, 478 n.177 (citing Letter from Cathy H. Lewis, Acting Dir., Policy and Enforcement Serv., Office for Civil Rights, to Barbara A. Bitters, Cultural and Equity Section, Wisconsin Dep't of Publ. Instruction (May 18, 1990)).

The regulations implementing Title IX, which were promulgated in 1974, further evidence the statute's applicability to primary and secondary schools. Those regulations provide that

[a] recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

34 C.F.R. § 106.34 (2001). Following this general statement, the regulations set forth

certain exceptions that describe limited circumstances in which same-sex classes are permissible in elementary and secondary schools. The exceptions include sex education courses, contact sports, and choral groups. See id. These limited exceptions, which were crafted not long after the statute was enacted, suggest that Title IX was not, nor should it be, interpreted as permitting single-sex schools and classes of the type that OCR is now contemplating.

B. Equal Educational Opportunity Act of 1974

The establishment of single-sex schools also contradicts the Equal Educational Opportunity Act of 1974 ("EEOA"). The stated purpose of the EEOA is to ensure that public schools offer all students equal educational opportunities regardless of their race, color, sex, or national origin. See 20 U.S.C.A. § 1701(a)(1). The Act specifically states that "the maintenance of dual school systems in which students are assigned to schools solely on the basis of race, color, sex, or national origin denies to those students the equal protection of the laws guaranteed by the fourteenth amendment." 20 U.S.C.A. § 1702 (a)(1) (emphasis added). While federal courts have disagreed about whether, and to what extent, the EEOA prevents the establishment of single-sex schools, at least one federal appellate court has held that the EEOA prohibits single-sex schools. See United States v. Hinds County Sch. Bd., 560 F.2d 619, 624 (5th Cir. 1977).[6]/

Furthermore, the legislative history of the EEOA suggests that Congress intended for the language cited above to prohibit sex segregation in public schools. During the debates concerning the proposed language, Representative Anderson offered an alternate proposal that did not include sex among the prohibited bases for student assignments. See 120 Cong. Rec. 8271 (1974). Congress' rejection of this proposal, see id. at 8281, demonstrates that the inclusion of sex in the enumerated factors that schools cannot use to make student assignments was not inadvertent. OCR's proposal to establish same-sex schools and/or classes is thus inconsistent with the EEOA.

C. The No Child Left Behind Act

In the face of precedent and statutory language militating against the establishment of gender-based distinctions in primary and secondary schools, OCR's proposal hangs by the narrow thread of a recent amendment to the Elementary and Secondary Education Act ("ESEA") passed as part of the No Child Left Behind Act in 2002. One subsection of this Act provides that local educational agencies should use certain funds for innovative assistance programs, which may include, among other things "[p]rograms to provide same-gender schools and classrooms (*consistent with applicable law*)." 20 U.S.C.A. § 7215(a)(23) (2002) (emphasis added). The plain language of the parenthetical in this amendment demonstrates that Congress had no intention of undermining the protections afforded by Title IX and the EEOA. Moreover, in passing this statute, Congress did not and, indeed, could not alter the equal protection analysis under which efforts to separate girls and boys in public schools must be scrutinized. See Hogan, 458 U.S. at 732-33. As discussed above, OCR cannot likely overcome this hurdle; there is simply no evidence demonstrating an "exceedingly persuasive justification" for the gender-based distinctions OCR is seeking to impose.

Establishing same-sex public schools and classes would also counteract a statute that Congress passed on the same day as the obscure provision through which OCR seeks to justify its dubious plan. As part of the No Child Left Behind legislative package, Congress also passed The Women's Educational Equity Act of 2001. See 20 U.S.C.A. § 7283, et seq. This Act was motivated by congressional findings that "efforts to improve the quality of public education also must include efforts to ensure equal access to quality education programs for all women and girls," and that "excellence in education, high educational achievements and standards, and the full participation of women and girls in American society, cannot be achieved without educational equity for women and girls." 20 U.S.C.A. §

7283(b)(4), (7). For the reasons described above, OCR's proposal to separate boys and girls in primary and secondary schools not only would fail to advance, but would affirmatively undermine those objectives.

VI. Policy Reasons Dictate Against the Establishment of Same-Sex Schools and Classes.

In addition to raising the serious constitutional and statutory concerns articulated above, OCR's proposal is flawed as a matter of public policy.

A. Absence of Truly Equal Opportunities

As the Supreme Court has noted, separate but equal is never really equal in the realm of public education. See Brown, 347 U.S. at 495. This principle is as applicable to gender as it is to race. Numerous examples demonstrate that separate programs for men and women have never been equivalent. All-male schools have had greater funding, more skilled staff, and a stronger curriculum than all-female schools. See Kristin S. Caplice, The Case for Public Single-Sex Education, 18 Harv. J.L. Pub. Pol'y 227, 239 (1994) (citing David Tyack & Elizabeth Hansot, Learning Together: A History of Coeducation in American Schools (1990)); see also Lucinda M. Finley, Sex-Blind, Separate But Equal, or Anti-Subordination? The Uneasy Legacy of Plessy v. Ferguson for Sex and Gender Discrimination, 12 Ga. St. U. L. Rev. 1089, 1103-04 (1996) (noting that all-female schools usually have fewer academic course offerings) ("Finley").

Perhaps the area in which the disparities between separate men's and women's programs are most visible is within the field of athletics. On the intercollegiate level, inequities still exist thirty years after the enactment of Title IX. The National Women's Law Center has recently criticized 30 colleges for "failing to provide a 'fair share' of their athletics scholarships to women." Welch Suggs, Women's Law Group Warns 30 Colleges About Imbalances in Athletics Scholarships, Chron. of Higher Educ. (June 19, 2002). In addition, one study has shown that "the average base salary for a coach of a women's team is 59% of the average base salary for a coach of a men's team." Andrea M. Giampetro-Meyer, Recognizing and Remedying Individual and Institutional Gender-Based Wage Discrimination in Sport, 37 Am. Bus. L.J. 343, 356 (Jan. 1, 2000). Another study has indicated that "head coaches of women's teams receive only 25% of the average additional benefits head coaches of men's teams receive. Benefits include assistance in the areas of housing, transportation, tickets, and memberships to clubs." Id.

Inequities between men's and women's programs are also prevalent in professional sports. For instance, women's sports programs typically offer less prize money and lower salaries. The chair of the Wimbledon committee recently noted that Wimbledon pays women tennis players less than their male counterparts, stating: "There are no other tournaments [other than the US and Australian Opens] with equal prize money and we are not sure there are many other sporting events with equal parity in terms of men and women." Wimbledon Prize Money Increases, BBC Sport, (Apr. 23, 2002), at http://news.bbc.co.uk/sport/hi/english/tennis/ newsid_1945000/1945863.stm. Similarly, in 1999, the average salary for WNBA players was approximately $40,000, while the minimum NBA salary was $287,000. See Pat McKee & Mark Montieth, Sports Reputation Earns City a Women's League, Indianapolis Star, June 8, 1999, at IA.

These examples demonstrate concretely that separate is not equal when different programs are created for men and women. Even when programs are developed with the intention of counteracting sex discrimination, glaring inequities still plague them. Inevitably, the same inequities would manifest themselves in the single-sex programs OCR is seeking to

implement.

B. Sex-Stereotyping and the Objectification of Women

The establishment of single-sex schools and programs is also likely to exacerbate the sexualization and objectification of girls and women by depriving both boys and girls of the opportunity to interact daily as peers. Studies have demonstrated that all-boys schools promote sexism and feelings of superiority toward women. See Levit at 499-500; Finley at 1119. Considering that school is the "workplace" of children, OCR should seriously consider how a man could ever accept, and thrive under, the leadership of women in the workplace, if he has had no exposure to girls in this setting during his formative years. To eliminate the glass ceiling that hinders women in the workplace, collaborative interaction between girls and boys at the elementary and secondary levels should be encouraged. OCR's plan takes the exact opposite approach, thus threatening to perpetuate workplace inequality.

Furthermore, there is a significant risk that all-female schools and/or classes will be perceived as remedial and inferior. Strong empirical evidence demonstrates that sex segregation generates "feelings, habits, attitudes, and expectations of superiority and inferiority." Levit at 517. It is widely believed among educators that the establishment or preservation of all-male institutions signals male superiority. See Ruth Bader Ginsburg, Sex Equality and the Constitution: The State of the Art, 14 Women's Rts. L. Rep. 361, 365-66 (1992). In fact, as the Garrett court recognized, "should the male academies proceed and succeed, success would be equated with the absence of girls rather than the educational factors that more probably caused the outcome." 775 F. Supp. at 1007. OCR's proposal should be rejected because it treats (or at least appears to treat) girls as the problem instead of addressing the root cause of failures in public education.

C. Inappropriate Remedy for Harassment

While sexual harassment of girls and young women undoubtedly is a very real concern in our nation's public schools, separating girls from their male peers is not an appropriate or sufficient means of addressing the sexual harassment problem. Although establishing a limited number of all-female schools might serve the purpose of rescuing some girls from harassment, it is important to keep in mind the broader picture. Removing girls to a separate environment unfairly treats them as the problem and fails to address the motivations and misconceptions that cause male students and teachers to engage in harassing behavior. Moreover, since all-female programs are not likely to be available universally, those female students who remain in a coeducational environment that fails to address the causes of harassment directly are even more likely to be mistreated. A much better solution than isolating girls from boys would be to invest resources in proactively educating students and teachers about gender sensitivity and sexual harassment.

D. No Support For All-Male Programs

Even if OCR determines that the establishment of some all-female programs is warranted (which NOW asserts is not the case), there is absolutely no basis for establishing all-male counterparts to those programs. Research shows that same-sex education has an adverse impact on male students. See Levit at 500. "[T]he majority of research suggests that boys are served best, academically and socially, in coeducational environments." Id. For instance, a study by Valerie Lee and Helen Marks found that graduates of all-male schools demonstrated less concern for social justice and were less satisfied with the nonacademic aspects of their educational experience than their counterparts who attended coeducational schools. Id. at 498 (citingValerie E. Lee & Helen M. Marks, Sustained Effects of the Single-Sex Secondary School Experience on Attitudes, Behaviors, and Values in College, 82 J. Educ. Psychol. 578, 585-86 (1990)). Furthermore, establishing same-sex

programs that are limited to serving the traditionally dominant group (in this case, males) threatens to perpetuate discrimination and domination.

VII. OCR Should Explore Alternatives to Single-Sex Education.

Instead of promoting a single-sex education plan that has both legal and policy flaws, OCR should focus its resources and efforts on non-discriminatory programs that more directly address the problems facing public school systems. Examples of alternative plans through which OCR and/or local school districts might achieve more favorable results without treading on students' constitutional rights and instigating prolonged litigation include:

- Adequate Funding To Existing Coeducational Schools
- Smaller Class Sizes
- More Diverse Curriculum Offerings To Which All Students Have Access
- Gender Equity Training for Administrators, Teachers, Counselors, and Other Staff
- Sexual Harassment Training and Improving Support Services for Students Who Encounter Sexual Harassment

VIII. Conclusion

OCR has correctly identified that there are problems with our public schools that desperately need to be addressed. Unfortunately, OCR is proposing to counteract those problems with a discriminatory measure that will not improve public education.

The shameful history of school segregation in this country should not be forgotten. Particularly in light of that history, reinstating this practice in any form, regardless of whether it is voluntary or involuntary and regardless of the identity characteristic at issue, should not even be contemplated absent compelling evidence that it is the only way to ensure that all schoolchildren in the United States receive the education they deserve.

Respectfully submitted,

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[1]/ See discussion in Section V.A below.

[2]/ It is particularly troubling that OCR's Notice requests comment on whether school

districts should be required to provide justifications for single-sex programs. While the constitutionality of sex segregation is questionable in any event, doing so without any justification clearly would not pass constitutional muster. As explained further below, in the absence of scientifically-based research establishing a close connection between same-sex programs and educational outcomes, such programs are unconstitutional.

[3]/ The Supreme Court has acknowledged that "[w]hile the prejudicial attitudes toward women in this country have not been identical to those held toward racial minorities, the similarities between the experiences of racial minorities and women, in some contexts, 'overpower those differences.'" J.E.B. v. Alabama, 511 U.S. 127, 135 (1994) (citation omitted) (holding that intentional discrimination on the basis of gender by state actors in the use of peremptory strikes in jury selection violates the Equal Protection Clause).

[4]/ NOW strongly asserts that courts should apply strict scrutiny to gender-based classifications.

[5]/ Even if Title IX could be read to contain an explicit exemption for primary and secondary schools, such an exemption would not cure OCR's plan of the constitutional problems described in Section IV above. See Hogan, 458 U.S. at 733 (rejecting defendant's attempt to rely on Title IX exemption, noting that "[a] statute apparently governing a dispute cannot be applied by judges, consistently with their obligations under the Supremacy Clause, when such an application of the statute would conflict with the Constitution").

[6]/ But see Garrett, 775 F. Supp. at 1010 (holding that voluntary, experimental single-sex schools would not likely violate the EEOA, but distinguishing mandatory programs such as those at issue in Hinds).